

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

HERSHALL SHELLEY

*Plaintiff,*

vs.

RANDALL'S FOOD & DRUGS, LP

*Defendant.*

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Civil Action No. 1:20-CV-1157

**DEFENDANT'S NOTICE OF REMOVAL**

Defendant Randalls Food & Drugs, LP ("Defendant") files this Notice of Removal pursuant to 28 U.S.C. §§ 1441 and 1446 and respectfully shows:

**Commencement and Service**

1. On August 6, 2020 Hershall Shelley ("Plaintiff") commenced this action by filing an Original Petition ("State Court Petition") in District Court, in the 419<sup>th</sup> Judicial District of Travis County, Texas. Plaintiff filed his First Amended Petition on October 21, 2020. The case is styled Cause No. D-1-GN-20-004066; *Hershall Shelley vs. Randall's Food & Drugs, LP; Albertson's LLC; Randall's Food Markets, Inc.; Albertson's Companies, LLC; Kimco Realty Corporation; Albertson's Realty LLC; Albertson's Companies, Inc.; Albertson's Investor Holdings, LLC; Cerebus Capital Management, LP; and Cerebus Capital Management, LLC.*<sup>1</sup> Plaintiff's Original Petition **did not** allege the amount of monetary damages sought as required by Texas Rule of Civil Procedure 47.

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<sup>1</sup> See ***Exhibit A***, Plaintiff's Original Petition and First Amended Petition with citations.

2. The Original Petition was served on six of the ten corporate defendants through CT Corporation System, 1999 Bryan St., Ste. 900, Dallas, Texas 75201. The only proper party to this lawsuit, *Randalls Food & Drugs, LP* was served on August 11, 2020. Additional improper parties were served through CT Corporation System on August 13, 2020 including: *Albertson's LLC*; *Albertson's Realty LLC*, *Albertson's Companies, LLC*; *Kimco Realty Corporation*; and *Randalls Food Markets, Inc.*

3. Defendant *Randalls Food & Drugs, LP*, along with the additional improper parties that were served, timely filed their Original Answer to Plaintiff's Original Petition on September 4, 2020.<sup>2</sup> Defendants' Answer included a general denial, two special exceptions to Plaintiff's pleading under Texas Rule of Civil Procedure Rule 47, and numerous affirmative defenses, one of which identified *Randalls Food & Drugs, LP* as the only proper party named in this matter. After additional communication with counsel, Plaintiff amended his pleading on October 21, 2020<sup>3</sup> to correct the TRCP Rule 47 deficiency to specify a dollar range of the damages sought. Plaintiff's First Amended Petition seeks monetary relief "over \$200,000." Prior to the filing of Plaintiff's First Amended Petition, it was not apparent that this matter involved more than \$75,000 in controversy.

4. The case stated in the initial pleading was not removable because Plaintiff failed to plead the amount in controversy in his Original Petition. Because this Notice of Removal is filed within thirty days of the receipt of service of Plaintiff's

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<sup>2</sup> See **Exhibit A**, Defendant Randall's Food & Drugs LP's Original Answer and Affirmative Defenses.

<sup>3</sup> See **Exhibit A**, Plaintiff's First Amended Original Petition and Discovery Requests.

First Amended Petition it is therefore timely pursuant to 28 U.S.C. § 1446(b)(3). This Notice of Removal is also filed within one year of the commencement of this action and is thus timely pursuant to 28 U.S.C. § 1446(c).

### **Grounds for Removal**

5. Defendant is entitled to remove the state court action to this Court pursuant to 28 U.S.C. §§ 1332, 1441 and 1446 because this action is a civil action involving an amount in controversy exceeding \$75,000.00 between parties with diverse citizenship.

### **Improper Joinder of Parties**

6. Defendant Randalls Food & Drugs, LP is the only proper party. Randalls Food & Drugs, LP is the entity that operates Randalls grocery stores in Texas, including the location at 715 S. Exposition Boulevard, Austin, Texas 78703, where Plaintiff claims to have sustained his alleged injuries forming the basis of this lawsuit.<sup>4</sup> Defendants Albertson's LLC, Randall's Food Markets, Inc., Albertson's Companies, LLC, Kimco Realty Corporation, Albertson's Realty LLC, Albertson's Companies, Inc., Albertson's Investor Holdings, LLC, Cerebus Capital Management, LP, and Cerebus Capital Management, LLC. (collectively "Improper Defendants") are improperly joined in this matter. None of the Improper Defendants named in Plaintiff's First Amended Petition owned, maintained, operated, or controlled the store where Plaintiff was allegedly injured.<sup>5</sup> The citizenship of the Improper

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<sup>4</sup> See *Exhibit D*, Affidavit of Michael Dingel

<sup>5</sup> *Id.*

Defendants should therefore be ignored for purposes of determining diversity jurisdiction. That said, the Improper Defendants are also diverse as set forth below.

**Diversity of Citizenship**

7. There is complete diversity of citizenship between Plaintiff and the only proper Defendant, Randalls Food & Drugs, LP.

8. Plaintiff is a citizen of Travis County, Texas.<sup>6</sup>

9. Defendant Randalls Food & Drugs, LP (“Defendant”) is not a citizen of the State of Texas. Defendant is a Delaware limited partnership with its principal place of business in Pleasanton, California.<sup>7</sup> Defendant’s general partner is Randall’s Food Markets, Inc., a Delaware corporation. Defendant’s sole limited partner is Randall’s Investments, Inc., a Delaware corporation. Randall’s Food Markets, Inc. and Randall’s Investments, Inc. have their principal places of business in Pleasanton, California. The diversity of citizenship between Defendant and a Texas resident was recently confirmed by this Court in a similar matter filed against Defendant.<sup>8</sup>

10. It is undisputed that the Improper Defendants are not citizens of Texas either. Plaintiff’s First Amended Petition correctly alleges that all the Improper Defendants are “foreign” companies. As set forth in the attached certification of Michael Dingel, none of the Albertsons-related Defendants are citizens of Texas

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<sup>6</sup> See **Exhibit A**, Plaintiff’s Original Petition at ¶ 3; Plaintiff’s First Amended Petition at ¶ 3.

<sup>7</sup> *Id.*

<sup>8</sup> See **Exhibit F**, Order of Judge James R. Nowlin in the matter of *Leslie Glasper v. Randalls Food & Drugs, LP*, cause no. A-20-CV-00619-JRN

including: Albertson's LLC, Randall's Food Markets, Inc., Albertson's Companies, LLC, Albertson's Realty LLC, Albertson's Companies, Inc., and Albertson's Investor Holdings, LLC. As set forth in the attached certification of Glenn Brettschneider, Kimco Realty Corporation is a Maryland corporation with its principal place of business in New York. According to Plaintiff's Petition, both Cerebus Capital Management, LP and Cerebus Capital Management, LLC are "foreign" entities. And of course, neither played any role at all in the operation of the Randall's store where Plaintiff claims he was hurt.

#### **Amount in Controversy**

11. There is more than \$75,000 alleged in controversy. Pursuant Plaintiff's First Amended Original Petition, Plaintiff now seeks more than \$200,000 but less than \$1,000,000 in damages.<sup>9</sup>

#### **Venue**

12. Venue lies in the Western District of Texas, Austin Division, pursuant to 28 U.S.C. §§ 1441(a) and 1446(a) because Plaintiff filed the action in this judicial district and division.

#### **Notice**

13. Defendant will give notice of the filing of this Notice of Removal to all parties of record pursuant to 28 U.S.C. § 1446(d). Defendant will also file with the

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<sup>9</sup> See **Exhibit A**, Plaintiff's First Amended Petition at ¶ 2.

clerk of the state court and will serve upon Plaintiff's counsel, a notice of the filing of this Notice of Removal.

**Exhibits to Notice of Removal**

14. In support of this Notice of Removal and pursuant to 28 U.S.C. §1446(a), true and correct copies of the following documents are attached to this Notice as corresponding lettered exhibits:

- A. Index with Docket Sheet and all pleadings, process, orders, and all other filings in the State Court Lawsuit – ***Exhibit A***
- B. Certificate of Interested Persons – ***Exhibit B***
- C. Notice of Filing Removal in State Court – ***Exhibit C***
- D. Certification of Michael Dingel - ***Exhibit D***
- E. Certification of Glenn Brettschneider – ***Exhibit E***
- F. Order of Judge James R. Nowlin in the matter of *Leslie Glasper v. Randalls Food & Drugs, LP*, cause no. A-20-CV-00619-JRN – ***Exhibit F***

**Prayer**

WHEREFORE, Defendant Randalls Food & Drugs, LP, pursuant to the statutes cited herein and in conformity with the requirements set forth in 28 U.S.C. § 1446, removes this action from the District Court of Travis County, Texas to this Court.

Respectfully submitted,

By: /s/ **Trek Doyle**

Trek Doyle

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*ATTORNEYS FOR DEFENDANT*

*RANDALLS FOOD & DRUGS, LP*



Doyle & Seelbach

**CERTIFICATE OF SERVICE**

By my signature above, I hereby certify that a true and correct copy of the above and foregoing document has been served by electronic delivery to counsel identified below on this, the 20th day of November 2020.

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